34-1554

Office - Supreme Court, U.S.
FILED
MAR 29 1984
ALEXANDER L. STEVAS
CLERK

No.....

In The

Supreme Court of the United States

October Term, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GERALD L. BALILES
Attorney General of Virginia
WILLIAM G. BROADDUS
Chief Deputy Attorney General
DONALD C. J. GEHRING
Deputy Attorney General
JERRY P. SLONAKER*
Senior Assistant Attorney General
MARGARET POLES SPENCER
RUSSELL C. WILLIAMS
Assistant Attorneys General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071
Attorneys for Petitioner

* *Counsel of Record*

20pp

QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright* v. *Sykes* rather than as an independent ground for habeas corpus relief.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Renders the "Cause" Requirement of *Wainwright* Virtually Meaningless 6

II. The Opinion Below Conflicts With Opinions of Other Circuit Courts of Appeals 9

III. The Ruling Below that *Wainwright* "Cause" Claims Need Not be Exhausted Involves an Important Question of Federal Law 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Alcorn v. *Smith,* 724 F.2d 37 (6th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3617 (U.S. February 25, 1985) (No. 84-5636) 10, 11

Anderson v. *Harless,* 459 U.S. 4 (1982) 11, 12

Cole v. *Stevenson,* 620 F.2d 1055 (4th Cir.), *cert. denied,* 449 U.S. 1004 (1980) 3

Page

Crowell v. *Zahradnick*, 571 F.2d 1257 (4th Cir. 1977) 7

Dietz v. *Solem*, 677 F.2d 672 (8th Cir. 1982) 10

Engle v. *Isaac*, 456 U.S. 107 (1982) 7, 8

Gates v. *Henderson*, 568 F.2d 830 (2nd Cir. 1977) 10

Henderson v. *Jago*, 681 F.2d 471 (6th Cir. 1982) 9

Jenkins v. *Anderson*, 447 U.S. 231 (1980) 12

Jones v. *Jago*, 701 F.2d 45 (6th Cir. 1983) 9

Long v. *McKeen*, 722 F.2d 286 (6th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1608 (1984) 9

Palmes v. *Wainwright*, 725 F.2d 1511 (11th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 227 (1984) 10

Reed v. *Ross*, 468 U.S. ___, 104 S.Ct. 2901 (1984) 10

Rose v. *Lundy*, 455 U.S. 509 (1982) 11

Satterfield v. *Zahradnick*, 572 F.2d 443 (4th Cir. 1978) 7

Slayton v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan* v. *Paderick*, 419 U.S. 1108 (1975) 3

State v. *Abernathy*, 36 N.C. App. 527, 244 S.E.2d 696 (1978) 7

Strickland v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984) 7

Thomas v. *Auger*, 738 F.2d 936 (8th Cir. 1984) 10

Tsimtzotakis v. *LeFevre*, 736 F.2d 57 (2d Cir.) *cert. denied*, 105 S.Ct. 216 (1984) 10

Wainwright v. *Sykes*, 433 U.S. 72 (1977) ..... passim

Weaver v. *McKaskle*, 733 F.2d 1103 (5th Cir. 1984) 9

Statutes

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254	3, 11
Fla. R. Cr. P. 190(i)	7
Ohio R. Cr. P. 30	7
Va. S. Ct. R. 5:21	3

In The

Supreme Court of the United States

October Term, 1984

No. .....

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Allyn R. Sielaff, Director of the Virginia Department of Corrections, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc Court of Appeals is not reported at this time (Pet. App 1). The opinion of the panel of the Court of Appeals is reported at *Carrier* v. *Hutto,* 724 F.2d 396 (4th Cir. 1983) (Pet. App. 3). The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is not reported (Pet. App. 27).

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on December 27, 1983 (Pet. App. 3). The en banc opinion, on rehearing, was entered on February 7, 1985 (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The relevant statutory provision, 28 U.S.C. § 2254, is reproduced at Pet. App. 29.

STATEMENT OF THE CASE

The respondent, Clifford W. Carrier, was convicted of rape and abduction in March 1977. Prior to trial, counsel for respondent moved for discovery of the victim's statements. The judge examined the statements, found that they were not exculpatory and denied the motion. Carrier's counsel requested the statements again immediately before trial, but the judge denied the request for the same reason. The statements were ordered sealed and counsel formally objected to the trial court's ruling (Pet. App. 5).

Carrier's notice of appeal to the Virginia Supreme Court assigned as error, *inter alia,* the trial court's ruling prohibiting defense counsel from examining the statements, either prior to or during the trial. However, Carrier abandoned this claim in his petition for appeal. In April 1978, the Virginia Supreme Couurt denied respondent

Carrier an appeal. His petition for writ of certiorari was denied by this Court on January 8, 1979. *Carrier* v. *Virginia,* 439 U.S. 1076 (1979). On February 5, 1980 Carrier filed a habeas corpus petition in state circuit court, alleging that withholding the victim's statements from trial counsel was a denial of due process under the Fourteenth Amendment. The circuit court dismissed the petition because Carrier had failed to pursue this claim on direct appeal.[1] The Virginia Supreme Court affirmed the circuit court's dismissal of the petition by unpublished order of June 12, 1980 (Pet. App. 5-6).

In September 1980 Carrier filed a habeas corpus petition, under 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia, alleging that he was denied due process because the prosecution deliberately withheld the victim's statements from defense counsel and because the trial court denied his descovery request. The Commonwealth moved to dismiss the petition, alleging (1) failure to raise these issues on direct appeal barred collateral attack under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), and (2) Carrier had not exhausted state remedies.[2] In August 1982, the United States Magistrate recommended dismissal of the petition on the basis of petitioner's procedural default in failing to raise his claims on direct

---

[1]Under Virginia law, only errors asserted in the petition for appeal will be noticed by the Virginia Supreme Court (Va. S. Ct. R. 5:21). Errors that could have been raised on appeal may not be raised for the first time in collateral post-conviction proceedings. *Slayton* v. *Parrigan,* 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan* v. *Paderick,* 419 U.S. 1108 (1975). *See generally Cole* v. *Stevenson,* 620 F.2d 1055 (4th Cir.), *cert. denied,* 449 U.S. 1004 (1980).

[2]As pointed out by the Court of Appeals below, the Commonwealth anticipated that in amended pleadings Carrier might assert ineffectiveness of counsel as the cause for omitting his claim on the state appeal (Pet. App. 6).

appeal (Pet. App. 6). Carrier then filed a "Motion of Objection and Exception" to the Magistrate's report, arguing that his procedural default should be excused because it was "the result of eneffective [sic] assistance of counsel." (Pet. App. 6).

In October 1982, the District Court approved the Magistrate's report and held that the habeas claim was barred by procedural default (Pet. App. 6). The District Court also stated that Carrier must establish "cause" for the procedural default, "in the first instance," in the Virginia state courts (Pet. App. 7).

Carrier appealed this order to the United States Court of Appeals for the Fourth Circuit. In his brief, he asserted ineffective assistance of counsel as "cause" to excuse the procedural bar under *Wainwright* v. *Sykes* (Pet. App. 11). He argued that his attorney's error in failing to pursue an issue on appeal also constituted ineffective assistance of counsel in violation of the Sixth Amendment (Pet. App. 25).[3]

On February 7, 1985, a panel of the Court of Appeals (2-1 decision) reversed the District Court's order and remanded the case for further hearings. The panel stated that the central issue was whether a single act or omission by counsel, insufficient by itself to contravene the Sixth Amendment, may satisfy the "cause" prong of the exception to preclusive procedural default discussed in *Wainwright*. (Pet. App. 9). The panel then held that "attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy."

---

[3]This Sixth Amendment claim was expressly abandoned in oral argument in the Court of Appeals below.

(Pet. App. 11-12). The panel defined attorney error as the failure of trial counsel to exercise judgment, through ignorance or oversight, "in dereliction of the duty" to represent the client. *Id.*

The panel also held the District Court erred in ruling that Carrier must first present his claim of attorney error to the state courts. "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." (Pet. App. 14). The panel remanded the case for the District Court to determine "cause,"—*i.e.*, whether counsel's failure to appeal the discovery claim was in fact attorney error or a strategic act by counsel—and "prejudice" under *Wainwright* (Pet. App. 15).

Judge Hall, in his dissent, found there was no basis for remand, because petitioner had not alleged any prejudice and because the alleged attorney error could not constitute *Wainwright* "cause." "Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under *Wainwright*), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the *Wainwright* bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. App. 20). Judge Hall also noted the alleged attorney error should have been raised in Carrier's state habeas petition and, "even if petitioner could prove cause and prejudice under the *Wainwright* exception, the case still must be dismissed for failure to exhaust state remedies." (Pet. App. 22).

On February 7, 1985, the en banc court adopted the panel majority's decision in a 5-4 per curiam opinion. The four dissenting judges, including Judge Hall, adopted the panel dissent. (Pet. App. 2).

On March 7, 1985, the Court of Appeals stayed issuance of the mandate, pending the filing of this petition.

REASONS FOR GRANTING THE PETITION

I.

The Opinion Below Renders the "Cause" Requirement of WAINWRIGHT Virtually Meaningless.

This case presents the question of whether a habeas corpus petitioner who has failed to raise a constitutional claim on direct appeal, and who therefore is barred from presenting the claim in state habeas proceedings, may show "cause" under *Wainwright* for his procedural default by establishing that his attorney's ignorance, inadvertence, or oversight was the basis for the default. In *Wainwright*, this Court held that a state prisoner, who procedurally defaults a claim by failing to comply with a state's contemporaneous objection rule, is barred from obtaining federal habeas corpus review of the claim, absent a showing of cause and actual prejudice. 433 U.S. at 87. In holding that the acts or omissions of counsel may constitute "cause," the Fourth Circuit has ignored the decisions of this Court, eviscerated the *Wainwright* decision, and dramatically expanded the scope of federal review available on collateral attack.

The decision below allows any defendant, whose attorney performed at trial or on appeal with diligence and skill but made an isolated error not amounting to ineffective assistance of counsel, to clear *Wainwright's* "cause" hurdle. That hurdle was erected, in part, to protect the legitimate state interest of allowing state courts to correct their errors promptly and to avoid piecemeal review of convictions. *Wainwright,* 433 U.S. at 91. The decision

below[4] ignores the legitimate state interests underlying the *Wainwright* procedural default rule[5] and opens a gap in the "cause and prejudice" exception to the procedural bar that will, as Judge Hall stated in the panel dissent below, swallow the rule itself. (Pet. App. 20).

Practically any non-tactical failure to raise a point can, with benefit of hindsight, be called attorney error. Criminal defendants, however, are guaranteed reasonably competent counsel, not infallible counsel. Fundamental fairness is not undermined unless counsel's error falls below an objective standard of reasonableness. *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052, 2065 (1984).

The decision below will foster the very problems this Court hoped to avert in *Strickland*: "Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." 104 S.Ct. at 2066. Shadow trials of counsel's competence would be only part of the problem; such "quests for error" would themselves suffer from the prejudicial remoteness of proof that this Court fashioned *Wainwright,* in part, to avoid. 433 U.S. 72, 88 (1977); *see also* 433 U.S. at 112 n.11 (Brennan, J., dissenting).

Moreover, the Fourth Circuit decision here is inconsistent with the legal principles set forth in *Engle* v. *Isaac,* 456

---

[4]The Chief Judge of the Fourth Circuit underscored the importance of settling the issue here presented by citing, in at least two related published opinions, this Court's statement that it would define cause and prejudice in an appropriate case. *Satterfield* v. *Zahradnick,* 572 F.2d 443, 447 (4th Cir. 1978) (Winter, J., specially concurring) (deliberate non-objection); *Crowell* v. *Zahradnick,* 571 F.2d 1257, 1262 (4th Cir. 1977) (Winter, J., dissenting) (possibly deliberate non-objection).

[5]All fifty states have procedural default rules. *E.g., State* v. *Abernathy,* 36 N.C.App. 527, 244 S.E.2d 696 (1978); Ohio R. Cr. P. 30; Fla. R. Cr. P. 3.190(i).

U.S. 107, 134 (1982). In *Engle*, this Court explicated the finality, comity, and effective administration of justice considerations supporting the *Wainwright* doctrine. 456 U.S. at 128-129.[6] The Court then held that a habeas petitioner had not established the "cause" required under *Wainwright* to excuse his failure to object to a jury instruction. The Court stated that counsel's failure to recognize, or "unawareness" of, a non-novel claim could not constitute cause for a procedural default:

> [T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

456 U.S. at 134.

The Fourth Circuit's holding that counsel's ignorance or inadvertence can constitute cause thus contravenes this Court's decision in *Engle*. Indeed, several courts, without defining the level of attorney error needed to establish

---

[6]The Court stated: "[The habeas writ] imposes special costs on our federal system. . . .

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. . . . [T]he trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel . . . has detracted from the trial's significance by neglecting to raise a claim in that forum. The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling. . . ." 456 U.S. at 128-129 (footnote omitted).

cause, have noted that an "inadvertence" or "unawareness" excuse would circumvent the *Engle* ruling. *Henderson* v. *Jago,* 681 F.2d 471, 474 (6th Cir. 1982); *see Weaver* v. *McKaskle,* 733 F.2d 1103, 1105-1106 (5th Cir. 1984); *Jones* v. *Jago,* 701 F.2d 45, 47 (6th Cir. 1983).

We submit that this Court should address the collateral review question presented here and reject the reasoning of the court below that renders *Wainwright* virtually meaningless.

II.

The Opinion Below Conflicts with Opinions of Other Circuit Courts of Appeals.

The Fourth Circuit ruled, in the en banc opinion below, that attorney error not constituting ineffective assistance of counsel in violation of the Sixth Amendment may satisfy the *Wainwright* "cause" requirement. In essence, the Court held any non-deliberate or non-tactical error by counsel may excuse a procedural default under *Wainwright.*

The Fourth Circuit decision is clearly in conflict with decisions in several circuits that address the issue of the level of attorney error needed to establish "cause" under *Wainwright.* The Second, Sixth, and Eighth Circuits have held that counsel's negligence, inadvertence, ignorance, or mistake in judgment do not constitute *Wainwright* "cause." In *Long* v. *McKeen,* 722 F.2d 286 (6th Cir. 1983), *cert. denied,* ___ U.S. ___, 104 S.Ct. 1608 (1984), a habeas petitioner argued that trial counsel's incompetence in not objecting to a jury instruction was sufficient to satisfy the "cause" required by *Wainwright,* since it was clear that the failure to object was not a "tactical" decision. 722 F.2d at 288. The Sixth Circuit disagreed, and held that cause is not established by counsel's ignorance of the law or mistake in judgment. 722 F.2d at 289.

In *Tsirizotakis* v. *LeFevre,* 736 F.2d 57, 62 (2d Cir.), *cert. denied,* 105 S.Ct. 216 (1984), the Second Circuit held that if acts or omissions of counsel are asserted as "cause" under *Wainwright,* they must amount to ineffectiveness of counsel "of constitutional dimensions." 736 F.2d at 62. *See also Gates* v. *Henderson,* 568 F.2d 830, 843 n.6 (2nd Cir. 1977) (Oakes, J., concurring). Similarly, in *Dietz* v. *Solem,* 677 F.2d 672, 673-75 (8th Cir. 1982), and *Thomas* v. *Auger,* 738 F.2d 936, 939 (8th Cir. 1984), the Eighth Circuit held that trial counsel's unawareness of a non-novel claim, or trial counsel's oversight or negligence do not constitute cause under *Wainwright. See also Palmes* v. *Wainwright,* 725 F.2d 1511, 1525 (11th Cir.), *cert. denied,* 105 S.Ct. 227 (1984) (court rejected argument that any non-strategic decision by trial counsel would constitute "cause" for a procedural default under *Wainwright.*)

This Court left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard" in *Wainwright,* 433 U.S. at 87. The conflict in the circuits on whether non-tactical attorney error is sufficient "cause" to excuse a procedural default should be resolved by this Court. The conflict is strictly one of law, and cannot be accounted for on the basis of variations in the factual situations among the cases involved. Therefore, in order to achieve a uniform application of federal law in the federal courts, review by this Court is required.[7]

---

[7]This Court has reviewed issues involving the availability of federal habeas corpus review to petitioners who procedurally defaulted on a claim in state court. During the last term, the Court held that a petitioner can be excused from procedural default if the claim asserted was "novel" at the time of his conviction. *Reed* v. *Ross,* 468 U.S. —, 104 S.Ct. 2901 (1984). More recently, this Court granted certiorari on the issue of whether *Wainwright* "cause" determinations must first be sought in state courts. *Alcorn* v. *Smith,* 724 F.2d 37 (6th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3617 (U.S. February 25, 1985) (No. 84-5636) (see discussion, page 11-12 of this Petition).

III.

The Ruling Below that WAINWRIGHT "Cause" Claims Need Not be Exhausted Involves an Important Question of Federal Law.

In the case at bar, the Fourth Circuit also held that the "exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." (Pet. App. 14).

This holding is in direct conflict with the decision of the Sixth Circuit in *Alcorn* v. *Smith,* 724 F.2d 37 (6th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3617 (U.S. February 25, 1985) (No. 84-5636). This Court recently granted certiorari in *Alcorn,* to review the identical question of whether federal habeas corpus petitioners are required to exhaust *Wainwright* "cause" claims, in addition to independent claims, in state courts. Since the Court will be reviewing the issue in *Alcorn,* and since the *Alcorn* petition for certiorari emphasized the direct conflict with the Fourth Circuit's decision in *Carrier,* certiorari should be granted, and the cases consolidated for review.

This Court has held that a federal court cannot consider a habeas petition unless the petitioner has "fairly presented" the "substance" of his federal claim to the state courts. *Anderson* v. *Harless,* 459 U.S. 4 (1982). This exhaustion doctrine requires a habeas applicant to exhaust "the question presented" in his federal petition "by any available procedure" in state courts. 28 U.S.C. § 2254(c). The precise issue involved here, exhaustion of the "cause" claim, has not been addressed by this Court, or any circuit courts other than the Sixth and Fourth Circuits. However, in *Rose* v. *Lundy,* 455 U.S. 509, 522 (1982), this Court held that a habeas petition must be dismissed if it contains *any* claims that have not been exhausted in the state courts. *Rose*

emphasizes the importance of reducing piecemeal litigation, by mandating review of all claims in a single proceeding. 455 U.S. at 520.

Here, petitioner's claims before the Court of Appeals concerning attorney error were never presented to, or considered by, the Virginia courts. Yet the Fourth Circuit has directed the District Court to determine the basis for appellate counsel's actions, even though applicability of the *Wainwright* doctrine may turn on interpretations of state law. *See Jenkins* v. *Anderson,* 447 U.S. 231, 234 n.1 (1980). As the Sixth Circuit noted in *Alcorn,* considerations of comity and federalism require that state courts be given the opportunity to decide "whether the circumstances . . . warrant excuse of procedural rules." 724 F.2d 37, 40. The decision in the instant case is not only inconsistent with *Alcorn,* but also with the principles of comity underlying *Rose* v. *Lundy,* 455 U.S. at 520-22, and *Anderson* v. *Harless,* 459 U.S. at 5. Review of this important exhaustion issue is therefore warranted.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit in this case conflicts with decisions in other courts of appeals, contravenes the decisions of this Court and undermines the principles of federalism and comity. For the reasons stated herein, petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

WILLIAM G. BROADDUS
Chief Deputy Attorney General

DONALD C. J. GEHRING
Deputy Attorney General

JERRY P. SLONAKER*
Senior Assistant Attorney General

MARGARET POLES SPENCER
RUSSELL C. WILLIAMS
Assistant Attorneys General

* Counsel of Record

March 1985